

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE SAINT PAUL CITY COUNCIL

In the Matter of All Licenses Held
by DRJ, Inc., d/b/a Diva's Overtime
Lounge

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Eric L. Lipman on March 21, 22 and 23 and April 5, 2007, at City Hall in St. Paul, MN 55102. The record closed following the receipt of post-hearing submissions of the parties on May 16, 2007.

Rachel Gunderson, Assistant City Attorney, 400 City Hall, 15 West Kellogg Blvd., St. Paul, Minnesota 55102, appeared on behalf of the Office of License, Inspections and Environmental Protection (LIEP). Andrew J. Dawkins, Attorney at Law, 220 South Sixth Street, Suite 1700, Minneapolis, MN 55402-4511, appeared on behalf of the Licensee, DRJ, Inc., d/b/a Diva's Overtime Lounge (DRJ or Licensee).

STATEMENT OF ISSUES

Should action be taken against the licenses held by DRJ, Inc., d/b/a Diva's Overtime Lounge, because the Licensee has maintained or permitted a condition that unreasonably annoys, injures or endangers the community?

As detailed below, the Administrative Law Judge concludes that a severe licensing action, but not license revocation, is warranted on this record.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

General Background

1. The Licensee, DRJ, Inc., d/b/a Diva's Overtime Lounge ("Diva's"), holds an on-sale liquor license from the City of St. Paul. Diva's also holds several other City licenses; including authorizations for the on-site sale of liquor

on Sundays, the sale of tobacco products, the sale of certain pre-packaged foods, conducting qualified charitable gaming and providing entertainment.¹

2. Diva's Overtime Lounge is located at 1141 Rice Street in Saint Paul, Minnesota. Diva's sits at the southwest corner of the intersection of Rice Street and Geranium Street.² Rice Street is a busy north-south route in Saint Paul and includes a number of business and retail establishments. Geranium Street is a street that is typical of those in the North End of Saint Paul, lined with older, single-family homes on urban-sized lots.

3. Diva's – and its principal, Debra R. Johnson – succeeded to the management of the Rice Street location in June of 2005, through a management agreement with the prior owner and liquor licensee, Mobandi.³

4. At or around the same time, Ms. Johnson's paramour, Mr. Fred Maclus, purchased the building and the land at 1141 Rice Street.⁴ While not a principal of DRJ, Mr. Maclus is often at Diva's during operating hours.⁵

5. On September 27, 2005, Ms. Johnson accepted, on behalf of Diva's, a set of six licensing conditions imposed by LIEP on issuance of a liquor license to DRJ (License 20050001998). Among the conditions that were agreed to, were:

[Condition 4] The licensee must provide working video surveillance camera and recorders on the premise to provide documentation of activities in the interior and exterior of the establishment. This equipment must be in operation during all business hours. Tapes must be maintained for thirty days and must be immediately available to the Saint Paul Police Department and the Officer of License, Inspections and Environmental Protection, upon request.

[Condition 5] The licensee must maintain a list of customers banned from the establishment for assaultive, disorderly or disruptive behavior. This list will contain the name and description of the banned person, as well as the date that he/she was banned. The list must be immediately available to the Saint Paul Police

¹ See, Exhibits 1, 9 and 12.

² See, e.g., Ex. 43.

³ See, Ex. 1 and Testimony of Fred Maclus; *compare generally*, Saint Paul Legislative Code § 409.11 (h) (<http://www.ci.stpaul.mn.us/code/lc409.html#sec409.11>).

⁴ *Id*; see also, Exs. 35, 36.

⁵ See, Test. of F. Maclus; see also, Exs. 12, 13.

Department and the Officer of License, Inspections and Environmental Protection, upon request.⁶

6. Following a series of disturbances inside or adjacent to Diva's in the ten months that followed, Ms. Johnson accepted imposition of ten additional licensing conditions. License Conditions 7 through 16, were:

[Condition 7] Security personnel shall be assigned to each entrance starting at 9PM every day, and shall remain until all patrons have left the licensed premises. Security personnel shall "wand" (using a metal detector) each patron and check all handbags and packages carried by patrons. Security personnel shall verify the age of patrons by checking state or federally issued identification cards (no picture ID, no entrance). Customers re-entering the establishment shall be subject to the same security measures as customers entering the establishment for the first time.

[Condition 8] The license holder shall retain a licensed and bonded security company to supervise security personnel. The license holder shall perform a criminal background check of all security personnel. License holder and the security company shall work with the District Council (District 6 Community Council) to establish what criteria will be applied prior to hiring any security personnel. The criteria will be no less than that outlined in St. Paul Legislative Code Chapter 376.16(e).

[Condition 9] The security personnel shall not fraternize with the patrons.

[Condition 10] The license holder shall not allow new patrons to enter the establishment after 12:00 midnight on Thursday, Friday, and Saturday nights. This condition shall remain in effect through September 5, 2006. Beginning September 5, 2006, the license holder shall not allow new patrons to enter the establishment after 1:00 AM on Thursday, Friday, and Saturday nights.

[Condition 11] All smokers shall be monitored by the security personnel to keep patrons from congregating in front of the establishment. Security personnel shall also insure that there is no excessive noise outside of the establishment. The security personnel shall keep smokers on the Geranium Street side of the establishment. The license holder shall work with police to make sure that the security cameras are properly aimed to provide surveillance of the Geranium Street sidewalk.

⁶ See, Ex. 12.

[Condition 12] Employees (including the license holder) shall not drink alcoholic beverages while on duty.

[Condition 13] The license holder, security staff, and employees of the establishment shall cooperate with the police by calling for assistance when there is a threat of violence or other criminal behavior.

[Condition 14] All doors and windows must be closed from 8:00 PM until closing to avoid exposing the neighborhood to excessive noise.

[Condition 15] The license holder shall make sure that all refuse and trash from the establishment is removed from the licensed premises and the surrounding sidewalks and alley by noon on a daily basis.

[Condition 16] The DJ shall make an announcement 30 minutes before closing asking all patrons to respect the community by leaving in an orderly and quiet manner.⁷

Facts Relating to the City's Unreasonable Operation Claims

7. On November 20, 2005, Saint Paul Police Officers Susan Hartnett and Christopher Hoyt observed a street fight while their squad car was on routine patrol. The fighting involved approximately 30 persons, in smaller clusters, at the intersection of Rice and Geranium Streets. As the squad car approached the scene, and the officers gave instructions for the combatants to disperse, another group of persons emerged from Diva's bar and joined the fighting.⁸ Responding to Officers Hartnett and Hoyt's radio call for assistance, several additional squad cars arrived at the scene and aided the team in dispersing this crowd.⁹

8. A later police report involving the November 20 disturbance includes the statement of Tara Parshall. Ms. Parshall informed investigating officers that the fight began inside Diva's when a group of four males clashed with a friend of Ms. Parshall.¹⁰

9. On January 29, 2006, a similar incident occurred. As detailed in the Police Report on the incident, two Caucasian patrons of the bar – Bryan J. Pettiford and Randal G. Taylor – took umbrage at the fact that a female friend of

⁷ See, Exs. 6, 7 and 11; see also, Testimony of Robert Kessler.

⁸ See, Testimony of Susan Hartnett and Christopher Hoyt; see also, Ex. 32.

⁹ *Id.*

¹⁰ See, Ex. 32 at 6.

their's was talking to two African-American patrons of the bar – Angelo D. Pernell and Edward G. Robinson. While Pernell and Robinson were conciliatory when first approached by Pettiford and Taylor, Pettiford and Taylor provoked the other two men into fighting. Pettiford and Taylor were later arrested for disorderly conduct.¹¹

10. Two weeks later, on February 11, 2006, Saint Paul Police responded to a report that gunshots had been fired outside of Diva's bar. Officer James McKnight, Jr., who was nearby, and the first to arrive at the scene, was not able to identify any particular person as having been involved in the shooting. Further, while a series of shell casings were found on Geranium Street, at a distance of approximately of 10 feet from a side door of Diva's bar, police interviews could not determine whether or not a patron of Diva's was involved in the firing of the weapon.¹²

11. On March 6, 2006, while on an evening patrol of Rice Street, Saint Paul Police Officer Steven Petron observed 3 men on Geranium Street squaring off in a fighting stance. The men were building owner Fred Maclus, Diva's security staffer Lawrence Stoehr and Diva patron Kenard D. Green.

12. Moments earlier, Stoehr and Maclus had insisted that Green leave Diva's, as Green was bothering other patrons. Green responded to this directive by attempting to punch the two other men. Together, Stoehr and Maclus then pressed Green out the exit door. Green continued to be aggressive toward the men outside of the bar.¹³

13. As detailed in Officer Petron's later report, Green matched the description of a man for whom St. Paul Police were otherwise searching that evening. Earlier on March 6, the St. Paul Police Department received two reports regarding a man, similarly dressed, who was engaging in threatening behavior. Because of a charge of disorderly conduct, and an earlier and active warrant for trespassing, Officer Petron took Green into custody.¹⁴

14. On March 18, 2006, Joshua J. Thomas, a tourist from Markham, Illinois, was a customer of Diva's bar and was asked to leave by Diva's management. Angry at this request, Thomas forcefully kicked open the side door of Diva's as he exited the bar. Additionally, as he walked westbound along Geranium Street, Thomas shouted through a double-paned window at the customers and employees that were still inside the bar. Thomas then broke this window with a single blow from a closed fist. Saint Paul Police Officers Diana

¹¹ See, Ex. 33; Testimony of Erik M. Johnson.

¹² See, Ex. 34; Testimony of James J. McKnight, Jr.

¹³ See, Ex. 35; Testimony of Steven J. Petron; *see also*, Test. of F. Maclus.

¹⁴ See, Ex. 35.

Olsem and Nicole Sack, who were parked in a squad car nearby, observed Thomas' exit from the bar and quickly took Thomas into custody. Thomas was subsequently booked by police on a charge of felony criminal damage to property.¹⁵

15. On the next evening, March 19, 2006, Antonio M. Adams was asked to leave Diva's bar by its management. In the view of Diva's staff, Mr. Adams and his companions were being too loud and boisterous. When Adams refused the directive to leave, Derrick Davis of Secure Force (Diva's then-security company) ejected him from the bar. The security team then detained Adams until the arrival of Saint Paul Police.¹⁶ Adams was charged with disorderly conduct and released into the custody of a friend.¹⁷

16. On April 28, 2006, Sergeant Craig Gromek, of the Saint Paul Police Department's Vice Squad, undertook an undercover alcohol compliance investigation. From a parked car approximately 80 feet away, Sergeant Gromek observed a crowd of Diva's patrons conversing – many times loudly and profanely – outside of the bar's front door on Rice Street. In Sergeant Gromek's estimation, the security personnel on duty that night did not sufficiently disperse this crowd or respond effectively to these patrons' loud and profane talk.¹⁸

17. On June 17, 2006, a still-unnamed patron of Diva's bar became loud and threatening to another customer. When fisticuffs began between these customers, Diva's security officers separated the combatants, ejecting them both from the bar, although through separate doorways. Once outside, the unruly patron that had been ejected through the Geranium Street exit made his way around to the other door, to re-engage with his target.¹⁹ As this patron resumed fighting with the other customer and security personnel, other Diva's patrons spilled from the doors to watch the fracas.

18. Soon after, Saint Paul Police Officer Eric Skog, while otherwise on routine patrol, approached the scene in his squad car. At this time, the number of those fighting in the street ballooned to approximately 12 people.²⁰ While Officer Skog (and a later-arriving Sergeant Thomas Radke) worked to disperse the crowd that had assembled, an unidentified male threw a cylindrical outdoor ashtray into the air hitting Diva's patron Roy W. Fulson in the head. As Fulson collapsed and lay on the ground bleeding, a cry from the crowd went up to the effect that "the police beat him down, they did it" – a false claim that made the

¹⁵ See, Ex. 36; Testimony of Diana L. Olsem; *see also*, Test. of F. Maclus.

¹⁶ See, Ex. 37; Testimony of S. Hartnett; Testimony of D. Davis.

¹⁷ See, Ex. 37 at 4.

¹⁸ See, Ex. 8; Testimony of Craig Gromek.

¹⁹ See, Test. of F. Maclus.

²⁰ See, Ex. 38; Testimony of Eric Skog.

scene increasingly hostile and dangerous for the police.²¹ With the intervention of several other police squads arriving on the scene, however, Officers Radke and Skog were able to restore order.²²

19. On September 12, 2006, Saint Paul Police were called twice to disturbance calls at Diva's. On both occasions that evening, police were called to respond to fighting among three individuals: Matthew J. Burns, Francisco Contreas and Joseph R. Lewis. While officers disbursed the trio from the street during the first visit to Diva's, with the instruction that none of the three should return to the bar, that instruction went unheeded. Approximately 30 minutes later, the combatants were again fighting outside of Diva's, and police were summoned a second time. As the squad cars returned to the scene, the suspects fled, evading capture.²³

Facts Relating to the License Condition Noncompliance Claims

20. Because one of the persons involved in the fighting outside of Diva's on September 12 (described most immediately above), was a person who had substantial gang ties, Saint Paul Police sought to obtain a copy of the video tape from Diva's surveillance cameras. To that end, on September 13, 2006, the day following the fighting, Licensing Inspector Kristina Schweinler traveled to Diva's and made a request for copies of the relevant video tapes. The bartender then on-duty, William Schally, was not able to furnish her with the requested recordings. Following a series of requests made by telephone to Debra Johnson and her counsel, a video cassette was furnished to city officials on September 20, 2007.²⁴

21. No clear images were perceptible on this tape and it appeared to police investigators that the cassette was blank.²⁵

22. Diva's management subsequently furnished a second video surveillance tape to city officials, this time with discernible images, on October 4, 2006.²⁶ Notwithstanding the proffer, city officials still doubt whether the correct recording was furnished, as the date line at the top of the images was not September 12, 2006.²⁷

²¹ *Id.*; Testimony of Pedro Girhalva, Jr.

²² See, Ex. 38 at 7; Testimony of Eric Skog.

²³ See, Ex. 27; Testimony of David Stokes; Testimony of Michael McGinn.

²⁴ See, Stipulation of April 5, 2007; Exs. 28 and 46; Testimony of Kristina Schweinler; Testimony of Christine Rozek.

²⁵ See, Stipulation of April 5, 2007; Test. of K. Schweinler; Test. of C. Rozek.

²⁶ *Id.*

²⁷ See, Test. of K. Schweinler; Test. of C. Rozek.

23. Early in the morning on November 11, 2006, as Debra Johnson and her team were exiting Diva's after closing time, a Saint Paul Police squad car approached the building. The officers had been called to the scene by a report that shots had been fired in the area and inquired if Johnson or her employees knew anything about those events. A brief exchange was had about the existence of outdoor surveillance cameras at Diva's although no request for copies of that evening's recordings was made at this time.²⁸

24. As the police investigation of the shooting intensified, Police Sergeants Richard Munoz and William Gray telephoned Debra Johnson at home – Sergeant Munoz at approximately 3:15 a.m. and Sergeant Gray approximately 45 minutes later. While police requested Ms. Johnson to return to Diva's and produce copies of the surveillance recordings, Ms. Johnson noted that she would need assistance from her technician in order to provide the requested copies. She instead pledged to contact the video technician and furnish the requested tapes later that morning.²⁹

25. Because Saint Paul Police officers were not able to obtain copies of the sought-after surveillance tapes by mid-morning, and had difficulty in reaching either Debra Johnson or her technician by cellular telephone, an angry set of exchanges between police and Johnson followed when Johnson arrived at Diva's at approximately 11:00 a.m. During the confrontations, officers undertook a check of Johnson's driver's license. Upon learning that Johnson's driver's license had expired, police officers took her into custody.³⁰

26. Shortly after, when Johnson's counsel, Jerome Rudawski, Esq., arrived at Diva's, he observed a team of uniformed officers pressing against the locked door of the office in which the surveillance video equipment was housed. Rudawski inquired of Sergeant Munoz as to whether the officers had a warrant authorizing their entry into this office.³¹ In an apparent acknowledgement that they had no such warrant, officers withdrew to complete a warrant application.

27. At 2:33 p.m. that day, the Honorable Judith M. Tilsen of the District Court approved a search warrant authorizing the seizure of both the surveillance recordings and the underlying recording system.³² Police completed the seizure of tapes and recording equipment at 2:45 p.m. on November 11, 2006.³³

Facts Relating to the Code Noncompliance Claims

²⁸ See, Stipulation of April 5, 2007; Test. of D. Johnson.

²⁹ See, Ex. 31; Stipulation of April 5, 2007; Test. of D. Johnson.

³⁰ See, Ex. 31; Testimony of Jerome Rudawski.

³¹ See, Test. of J. Rudawski; *see also*, Ex. 31.

³² See, Ex. 31; Stipulation of April 5, 2007.

³³ See, Stipulation of April 5, 2007.

The Smoker's Patio:

28. Following the enactment of an ordinance which banned smoking in the interior of bars within the city limits of Saint Paul, Debra Johnson sought to establish a place at or near Diva's where her customers could smoke cigarettes, while still complying with the new ordinance.³⁴

29. A key part of this plan was the fact that outdoor areas, such as patios, were specifically excluded from the reach of the new ordinance.³⁵

30. Further, because noise from patrons congregating near the Rice Street and Geranium Street exits of Diva's had been a source of complaints in the past, Johnson commissioned the construction of a patio at the south-west corner of Diva's building – at a point that was farthest from Geranium Street.³⁶

31. Before beginning construction, however, neither Johnson nor anyone else from DRJ, obtained the required building permit.³⁷ More problematic still, the structure of the patio consumed at least one parking space that Diva's had earlier pledged, as part of its licensure, to make available for customer parking.³⁸

32. Following the receipt of a report that construction of a patio was underway at Diva's, and later confirming that such a patio was in place, LIEP sent DRJ an Enforcement Notice.³⁹ The Notice, dated June 26, 2006, directed DRJ to complete one of two actions before July 3, 2006: DRJ could either furnish a complete site plan for the patio and proof that two replacement parking spaces had been obtained, or, in the alternative, remove the patio.⁴⁰

33. While Debra Johnson and DRJ did make some efforts to qualify the patio as a conforming structure, those efforts were not completed by July 3, 2006, or a later extended deadline of July 28, 2006.⁴¹ The patio structure was removed on or about August 1, 2006.

³⁴ See, Test. of D. Johnson.

³⁵ See, Saint Paul Legislative Code § 238.02 (2) ("Licensed liquor establishment means an establishment that has an on-sale intoxicating liquor license ... but does not include outdoor areas") and § 238.02 (3) ("Smoking is prohibited in restaurants, pool halls, bowling centers, rental halls, bingo halls and licensed liquor establishments") (emphasis added).

³⁶ See, Exs. 41 and 43; Test. of D. Johnson.

³⁷ See, Testimony of Robert Kessler.

³⁸ See, Exs. 15, 16, 17, 18, 41 and 43; Test. of D. Johnson.

³⁹ See, Exs. 15, 16, 17, 18.

⁴⁰ See, Ex. 18; *compare also*, Licensee's Exhibit 8.

⁴¹ See, Ex. 6; Licensee's Exhibit 8; Test. of D. Johnson; Testimony of Jeffrey Johnson.

Upgrades to the Kitchen Equipment:

34. While DRJ's Restaurant C license permits it to offer pre-packaged foods – such as potato chips – for sale to its customers,⁴² Debra Johnson harbored grander plans for Diva's. Because of her long professional history in the hospitality and catering industries, Johnson hoped to augment her Restaurant C license and obtain authorizations that would permit her to prepare and sell a broader menu of food.⁴³

35. As part of her upgrade plan, Johnson undertook the removal and replacement of an antiquated, unsanitary and sub-standard kitchen exhaust system that was over an existing stove.⁴⁴

36. The upgrades that Johnson received from her contractors included an exhaust hood that was not welded in place and which was connected to a grade of round pipe that was insufficient to meet the requirements of the City's mechanical code.⁴⁵ Similarly, the venting of the exhaust system was inadequate to comply with the current requirements of the Saint Paul building code.⁴⁶ Following a routine restaurant inspection, Senior Inspector Ronald Haider wrote to DRJ that "[t]his work was improperly installed and without the required plans, permits and inspections," and that because of the defects, use of the equipment would be hazardous.⁴⁷

37. Haider's July 28, 2006 letter further directed that sufficient repair or removal of the exhaust system needed to occur before August 31, 2006.⁴⁸ This performance date was later extended to October 18, 2006.⁴⁹

38. While DRJ contacted at least two vendors as to its need to modify the kitchen facilities, neither the upgrade nor the removal of the non-conforming equipment was completed by the extended deadline of October 18, 2006.⁵⁰

Temporary Signs:

⁴² See, Testimony of Robert Gunther.

⁴³ See, Test. of D. Johnson.

⁴⁴ *Id.*

⁴⁵ See, Ex. 48 and 49; Testimony of Ronald Haider.

⁴⁶ See, Ex. 48 and 50; Test. of R. Haider.

⁴⁷ See, Exs. 1 and 21.

⁴⁸ See, Ex. 21

⁴⁹ See, Ex. 22.

⁵⁰ See, Test. of D. Johnson.

39. Diva's is located in a TN2 – or traditional neighborhood – zoning district of Saint Paul.⁵¹ Within such a district there are strict limitations as to the display of temporary business signs on commercial properties. Among the limitations are:

- a. a temporary sign permit must be obtained before the sign is displayed;
- b. the total area of such signs is limited to 32 square feet; and,
- c. display of the permitted signs may not occur more often than 3 nonconsecutive 30-day periods in a single year.⁵²

40. In the autumn of 2006, LIEP received a complaint about the display of temporary business signs at Diva's – a complaint which prompted both a review of LIEP's licensing records and a visit from LIEP Inspector Yaya Diatta.⁵³ LIEP's records did not reveal DRJ as holding a temporary sign permit at the time.⁵⁴ Further, an inspection of Diva's facility revealed that 5 temporary signs, measuring a total of 126 square feet, were on display.⁵⁵

41. Following the inspection, Mr. Diatta sent Diva's an Enforcement Notice directing the removal of the non-conforming signs within 10 days.⁵⁶

42. On September 27, 2006, Diva's obtained a permit which authorized the display of 32 square feet of temporary signage.⁵⁷

43. Inspection visits on October 3rd and 4th, however, revealed that the banners posted outside of Diva's exceeded 32 square feet. Diva's was not in compliance with the limits of its earlier-issued permit until October 6, 2006.⁵⁸

Overdue Remittances:

44. Following the receipt of the Administrative Law Judge's report, relating to a separate claim of after-hours display of alcohol,⁵⁹ on September 27,

⁵¹ See, Ex. 54.

⁵² See, Saint Paul Legislative Code § 64.203 (a) ("Permits") and § 64.503 (b) (4) (Temporary signs in traditional neighborhoods); Ex. 54 and Testimony of Yaya Diatta.

⁵³ See, Exs. 1 and 54 and Test. of Y. Diatta.

⁵⁴ *Id.*

⁵⁵ See, Ex. 54 and Test. of Y. Diatta.

⁵⁶ *Id.*

⁵⁷ See, Ex. 1.

⁵⁸ Test. of Y. Diatta.

⁵⁹ See, *In the Matter of All Licenses Held by DRJ, Inc., d/b/a Diva's Overtime Lounge*, OAH Docket No. 11-6020-17359-6 (2006) (<http://www.oah.state.mn.us/aljBase/602017359.rt.htm>).

2006, the Saint Paul City Council adopted a resolution sanctioning DRJ.⁶⁰ As part of its adverse licensing action, the Council revoked DRJ's 2:00 a.m. closing license and imposed a fine and costs totaling \$3,300.⁶¹ Additionally, the Council directed that the \$3,300 assessment was due and payable within 30 days of its adoption of the resolution – October 27, 2006.⁶²

45. When the \$3,300 assessment was not received by LIEP or the City by November 7, 2006, a Notice of Intent to Suspend DRJ's Licenses was issued. The Notice advised that the City would proceed with suspension unless the entire past-due sum was received by November 20, 2006.⁶³

46. On November 20, 2006, a credit card payment in the amount of \$3,300 was made in favor of the City on behalf of DRJ.⁶⁴

Procedural Matters

47. On December 13, 2006, following a review of reports from various City Departments, the City issued a Notice of Intent to Revoke DRJ's Licenses. The Notice informed DRJ of the bases for the proposed action and the opportunity to request a hearing before an Administrative Law Judge.⁶⁵

48. With the receipt of a timely request for a Hearing, the City Attorney's office issued a Notice setting an initial hearing date for March 21, 2007.⁶⁶

49. On April 4, 2007, the Administrative Law Judge entered an Interim Order precluding the City Attorney from adducing evidence to the effect that the shootings that occurred on July 14, 2006 or November 11, 2006, at or near Diva's, established that the Licensee permitted conditions to exist that were contrary to Saint Paul City Code 310.06 (b) (8). As detailed in this Order, because the events on those evenings were then the subject of active criminal prosecutions, and key fact witnesses in the Saint Paul Police Department are privileged against disclosing details of those events prior to the completion of the criminal trials, "these matters [could not] be the subject of either discovery or examination by the Licensee."⁶⁷ In order to balance the "various and competing interests," the Administrative Law Judge permitted testimony as to "the events of

⁶⁰ See, Exs. 23, 24 and 25.

⁶¹ See, Ex. 23.

⁶² *Id.*

⁶³ See, Ex. 25.

⁶⁴ See, Ex. 26; Test. of J. Johnson.

⁶⁵ See, Ex. 39.

⁶⁶ See, Ex. 40.

⁶⁷ See, Interim Order, OAH Docket No. 8-6020-17788-2 (April 4, 2007).

July 14, 2006 or November 11, 2006, in the same manner as to which other historical events in the hearing record – such as meetings, inspections or police calls – are referenced,” but precluded these events from forming a separate basis for the City’s adverse licensing action.⁶⁸ To the extent that those events may provide a basis for an adverse licensing action, but were not litigated in this proceeding, the Licensee was advised that they may be the subject of a future proceeding on another day.

Based upon the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the St. Paul City Council have jurisdiction to hear this matter pursuant to Minn. Stat. § 340A.415 and St. Paul Legislative Code § 310.05.

2. The City of St. Paul gave proper notice of the hearing and has fulfilled all relevant substantive and procedural requirements of law and rule.

3. As the party proposing that a certain action be taken, the City has the burden of proving facts at issue by a preponderance of the evidence.⁶⁹

4. The City did not establish by a preponderance of the evidence that, by way of misconduct, the Licensee operated, maintained or permitted conditions that endangered the community.

5. DRJ was not in compliance with its obligations to make recordings of its video surveillance camera “immediately available to the Saint Paul Police Department and the Office of License, Inspections and Environmental Protection, upon request.”

6. DRJ was not in compliance with its obligation to apply for a building permit before undertaking construction of an adjacent patio structure or with its duty to maintain a minimum level of parking following the installation of the patio.⁷⁰

7. DRJ was not in compliance with its obligation to apply for a building permit before undertaking renovation of its kitchen exhaust system or with its duty to have that system inspected following completion of the renovations. Additionally, DRJ was not in compliance with its obligation to remove the non-conforming equipment by October 18, 2006.

⁶⁸ See, *id.*

⁶⁹ See, Minn. R. 1400.7300 (5) (2005).

⁷⁰ See, Saint Paul Legislative Code §§ 61.101 through 61.104 and 409.06 (g) (2).

8. As demonstrated by the events in late September and early October of 2006, DRJ was not in compliance with its obligation to apply for a temporary sign permit before displaying advertising banners on its building. Additionally, DRJ was not in compliance with its obligation to limit those temporary displays to a total area of 32 square feet.

9. DRJ did not remit in a timely fashion the \$3,300 in fines and costs assessed by the City Council of Saint Paul on September 27, 2006.

10. The Memorandum that follows below explains the reasons for these Conclusions. To the extent that the Memorandum includes matters that are more appropriately described as Conclusions, the Administrative Law Judge incorporates those items into these Conclusions.

11. Further, the Administrative Law Judge adopts as Conclusions any Findings of Fact that are more appropriately described as Conclusions.

Based upon the above Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the that the St. Paul City Council impose a weighty administrative sanction against the licenses of DRJ, Inc., d/b/a Diva's Overtime Lounge – but not revoke these licenses.

Dated: June 28, 2007.

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Taped, 15 tapes
No transcript prepared

NOTICE

The St. Paul City Council is requested to serve notice of its final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

The case pivots on the question of accountability. The binders of exhibits, the testimony from a chain of witnesses, and the detailed arguments from counsel are all focused on a key question: What misconduct, occurring at or near Diva's during the past 18 months, is attributable to DRJ?

The City's Unreasonable Operation Claims

Pointing to a stack of police reports, the City argues that because there have been so many public safety calls to this one establishment, DRJ's operations must be defective. Only a defect in the management, continues this argument, could result in so many serious events at one locale.

While there is some support for the view that DRJ is "responsible" for anything that occurs on its premises – obliging the licensee to be the guarantor of the good behavior of anyone who walks into or near its establishment⁷¹ – this is not the best reading of the law. The better and more complete view is that DRJ may be held to account in the licensing process for acts that it undertakes, or acquiesces to, which undermine public order.

To be sure, some of Diva's patrons have been frighteningly quick to violence. Yet the record as a whole does not establish that DRJ or its employees prompted this violence, encouraged it or were slow to confront it when it erupted. Indeed, to the contrary, the record contains considerable detail as to the efforts made by DRJ staff to contain and eliminate misbehavior; even at times when the personal risks of moving against violent patrons were substantial.

Likewise significant is Sergeant Gromek's testimony – who posed as a Diva patron during undercover liquor control investigations, on a number of occasions and at different times of the day. He testified that he did observe any problems with over service of alcohol or other inducements by the Licensee toward anti-social behavior.⁷² Similarly, many of the police officers who responded to disturbance calls at Diva's did not link DRJ's management practices with their being called to the scene.⁷³ Thus, while the City points to a very troubling array of police calls, the causal connections between the Licensee's actions, and the violent misconduct of its patrons, have never been made clear.

⁷¹ See, Saint Paul Legislative Code § 409.08 (5) ("Every licensee is hereby made responsible for the conduct of his place of business and required to maintain order and sobriety in such place of business").

⁷² See, Test. of C. Gromek.

⁷³ See, e.g., Test. of S. Petron; Test. of M. McGinn; Test. of E. Skog; Test. of E. Johnson.

The importance of this factual link can hardly be overstated. While “municipal licensing authorities have broad discretion to decide the manner in which liquor licenses are issued, regulated and revoked,”⁷⁴ in this case, the authority is not without its limits. The Council’s chosen words in Section 310.06 – namely that the Licensee has “operated,” “maintains or permits” harmful conditions – all suggest that regulatory sanctions will follow from misconduct which the Licensee has participated in, or the least, supported.⁷⁵ As to the violence occurring at Diva’s, the record does not establish such support or participation by the Licensee. Accordingly, even if Saint Paul could have enacted a far broader and less-forgiving liquor ordinance in the first instance, it is not proper now to substitute the words “where violence occurred” for these narrower, culpability-based standards.

Second, the case law seems to confirm the conclusion that revocation is a proper result only whether the Licensee is genuinely culpable for an intolerable condition. In the case of *C.L. Hinze, Inc. d/b/a Chuck’s Bar v. City of St. Paul* (cited by the City in its post-hearing submission), the owner-licensee’s role in “a significant act of violence” against an intoxicated and vulnerable patron, his attempts “to interfere with the licensing proceeding and dissuade the patron from testifying,” and an earlier history of obstructing police responses to an emergency call, all combine to suggest that license revocation is reserved for licensees who engage in more affirmative misconduct than is established by this record.⁷⁶

Third, and likewise important, this case points up the fact that Licensees like DRJ sit atop a razor’s edge of competing legal obligations. On the one hand, establishments like Diva’s are “public accommodations,” as to which licensees may not deny access on the basis of suspect classifications.⁷⁷ Our law guarantees that regardless of the color, creed, gender, sexual orientation or

⁷⁴ See, e.g., *Sabes v. City of Minneapolis*, 120 N.W.2d 871, 875 (Minn. 1963); *Bourbon Bar & Cafe Corp. v. City of St. Paul*, 466 N.W.2d 438, 440 (Minn. App. 1991).

⁷⁵ Compare, Saint Paul Legislative Code § 310.06 (b) (8) (“Such adverse action may be based on one or more of the following reasons ... [t]he licensed business, or the way in which such business is operated, maintains or permits conditions that unreasonably annoy, injure or endanger the safety, health, morals, comfort or repose of any considerable number of members of the public”).

⁷⁶ Compare, *C.L. Hinze, Inc. d/b/a Chuck’s Bar v. City of St. Paul*, 1996 Minn. App. LEXIS 909 (unpublished) (reprinted in full in the City’s Post-Hearing Submission, at 24); see also, *Hymanson v. City of St. Paul*, 329 N.W.2d 324, 326 (Minn. 1983) (revocation appropriate where the licensee stipulated to after-hour displays of alcohol and indecent exposure by male dancers).

⁷⁷ Compare, Minn. Stat. § 363A.03 (34) (2006) (“‘Place of public accommodation’ means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public”) with Minn. Stat. § 363A.11 (a)(1) (2006) (“It is an unfair discriminatory practice... to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex...”).

national origin of would-be patrons, when Diva's opens its doors, they are open equally wide to all members of the public. Yet, because the City was also holding Diva's accountable for the "clientele it attracted," DRJ instituted a set of controls that were aimed at bad behavior but did not, arbitrarily, exclude whole classes of customers. Among the changes that DRJ made were: prohibitions on the wearing of dew rags (a type of tight-fitting skull cap with a legionnaire flap, that is popular among gang members); prohibitions on references to gang activity or the wearing of gang-related colors; changes to music format; changes in the age of admission; and enhanced security procedures.⁷⁸ In combination, these measures appear to have been effective and suggest the route to obtaining still better results for the North End of Saint Paul.

Last, the proposed license revocation raises important questions as to the overall proportionality of the sanction. As the Council is well aware, in Saint Paul, revocation of a liquor license for cause is an adverse action that runs not only against the errant licensee but also against the underlying property.⁷⁹ A successful revocation, therefore, is a permanent bar to later use of the land and structures for on site liquor sales. Such a consequence is truly profound.

Minnesota Courts have apparently considered the breadth of this sanction only once – and in that case, incompletely. The licensee in the case of *Chuck's Bar*, cited above, attacked the Saint Paul ordinance which forbids later licensure as a "regulatory taking;" a matter that the Minnesota Court of Appeals declined to reach because it was not presented to the District Court below.⁸⁰

Even without direct guidance from the state courts as to the viability of a permanent bar to re-licensure, the concerns expressed by the courts as to license forfeitures in general, should give the Council pause.⁸¹ In the view of the Administrative Law Judge, applying a potent set of other restrictions and regulatory controls,⁸² short of revocation, would yield a better and sturdier result.

The City's Remaining Claims

As detailed in the Findings of Fact and Conclusions above, DRJ's failures to make video surveillance tapes available in a timely fashion to police; its unauthorized and unlawful construction of a patio; its unauthorized and potentially hazardous upgrades to kitchen equipment; its posting of

⁷⁸ See, Testimony of Thomas Radke; Test. of J. Johnson.

⁷⁹ See, Saint Paul Legislative Code § 409.03 (a)(1)(a).

⁸⁰ Compare, *C.L. Hinze, Inc. d/b/a Chuck's Bar v. City of St. Paul*, 1996 Minn. App. LEXIS 909 at * 9 (unpublished) (reprinted in full in the City's Post-Hearing Submission, at 24).

⁸¹ Compare, generally, *In re Revocation of Family Child Care License of Burke*, 666 N.W.2d 724, 728 (Minn. App. 2003); *In re Ins. Licenses of Kane*, 473 N.W.2d 869, 874 (Minn. App. 1991).

⁸² See generally, Saint Paul Legislative Code § 409.10.

nonconforming temporary signs; and its failure to pay remittances in a timely manner, make the imposition of a licensing sanction appropriate on this record.

E.L.L.